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No. 86-104

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

THE BOARD OF AIRPORT COMMISSIONERS
OF THE CITY OF LOS ANGELES, *et al.*,
Petitioners,

v.

JEWS FOR JESUS, INC., AND ALAN HOWARD SNYDER,
a.k.a AVI SNYDER
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
ARGUMENT	2
INTRODUCTION AND SUMMARY	2
I. THE PUBLIC AREAS OF THE LAX TERMINAL CONSTITUTE A QUINTESSENTIAL PUBLIC FORUM	8
A. A Quintessential Public Forum Is Defined By The Use of the Location for Expressive Activities, Not By It's "Principal Purposes" or By The Government's "Dedication" of The Location to Expression	9
B. Airport Terminal Facilities Are Quintessential Public Forums	14
II. EVEN IF THE LAX TERMINAL IS NOT A QUINTESSENTIAL PUBLIC FORUM, THE TOTAL BAN UPON CERTAIN PEACEFUL, NONOBSTRUCTIVE COMMUNICATIVE ACTIVITY IS INVALID BECAUSE SUCH A BAN DOES NOT SERVE IMPORTANT GOVERNMENTAL INTERESTS UNRELATED TO THE SUPPRESSION OF EXPRESSION IN A MANNER THAT WORKS NO GREATER RESTRICTION ON EXPRESSION THAN IS ESSENTIAL TO FURTHER THE GOVERNMENTAL INTEREST	19
CONCLUSION	27

TABLE OF AUTHORITIES

Cases: Page

Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968) 10
Brown v. Glines, 444 U.S. 348 (1980) 24
Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175 (1968) 12
Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir. 1975) 15, 17
City Council v. Taxpayers For Vincent, 466 U.S. 789 (1984) ..... *passim*
Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. ——, 53 U.S.L.W. 5116 (1985) ..... *passim*
Cox v. Louisiana, 379 U.S. 536 (1965) 3, 11, 12
Cox v. New Hampshire, 312 U.S. 569 (1941) 10, 19
Davis v. Massachusetts, 167 U.S. 43 (1897) 9, 12, 22
Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981) *cert. dismissed*, 458 U.S. 1124 (1982) 14, 15
Grayned v. City of Rockford, 408 U.S. 102 (1972) 10, 12, 13, 18
Greer v. Spock, 424 U.S. 828 (1976) 24
Hague v. CIO, 307 U.S. 496 (1939) ..... *passim*
Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981) 13, 18, 19
Hudgens v. NLRB, 424 U.S. 507 (1976) 23
International Society for Krishna Conciousness Inc. v. Eaves, 601 F.2d 809 (5th Cir. 1979) 15
Jamison v. Texas, 318 U.S. 413 (1943) 12
Jews for Jesus, Inc. v. Board of Airport Commissioners, 785 F.2d 791 (9th Cir. 1986) 2
Kunz v. New York, 340 U.S. 290 (1951) 10
Kuszynski v. City of Oakland, 479 F.2d 1130 (9th Cir. 1973) 15
Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) 24, 25
Martin v. City of Struthers, 319 U.S. 141 (1943) 12
Niemotko v. Maryland, 340 U.S. 268 (1951) 11
NLRB v. Babcock & Wilcox, 351 U.S. 105 (1956) 23
Perry Education Association v. Perry Local Educators Ass'n, 460 U.S. 37 (1983) 7, 10, 11, 20, 24, 25

TABLE OF AUTHORITIES—Continued

Page

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 23
Republic Aviation v. Labor Board, 324 U.S. 793 (1945) 23
Rosen v. Port of Portland, 641 F.2d 1243 (9th Cir. 1981) 15
Schneider v. New Jersey, 308 U.S. 147 (1939) 11, 13
Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) 4
United States v. Grace, 461 U.S. 171 (1983) 9, 10, 12
United States v. O'Brien, 391 U.S. 367 (1968) 8, 21, 26
United States Postal Service v. Greenburgh Civic Ass'n, 453 U.S. 114 (1981) 24, 25
United States Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760 (D.C. Cir. 1983) 14, 15, 18
Valentine v. Christiansen, 316 U.S. 52 (1942) 11
Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir. 1968) 15, 16, 17

Constitutional Provisions:

First Amendment to the Constitution of the United States ..... *passim*

Regulations:

45 Fed. Reg. 35,314 (1980) 17
14 C.F.R. §§ 159.91-94 (1982) 17

Other Authorities:

Farber & Nowak, *Misleading Nature of Public Forum Analysis: Content and Context in the First Amendment Adjudication*, 70 Va. L. Rev. 1219 (1984) 4
Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 S.Ct. Rev. 113 ..... 4, 10

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The American Federation of Labor and Congress of Industrial Organizations, a federation of 91 national and international labor organizations with a total membership of 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

ARGUMENT

INTRODUCTION AND SUMMARY

The Los Angeles International Airport ("LAX")—a public facility established by the City of Los Angeles and operated by the City's Board of Airport Commissioners—opens its terminals to all members of the general public, including those "who have no purpose or desire to use the transportation facilities within the terminal areas". Jt. App. 13a. The Airport "[does] not attempt to restrict . . . walking, reading, shopping, eating, drinking [or] conversing with other members of the general public in the interior of terminal areas at LAX." *Id.* Nonetheless, the Airport Commissioners *do* claim the right to prevent entirely some forms of peaceful, nonobstructive communication by individuals otherwise legally on the premises.

Against that background it is difficult to divine precisely what expressive activity the Airport seeks to ban. On the one hand, the Resolution under which respondents were ejected from the airport reads as follows:

> Now, therefore Be it Resolved by the Board of Airport Commissioners that the Central Terminal Area at Los Angeles International Airport *is not open for First Amendment activities by any individual and/or entity*; . . .
>
> Be it Further Resolved that if any individual or entity engages in First Amendment activities within the Central Terminal Area at Los Angeles International Airport, the City Attorney of the City of Los Angeles is directed to institute appropriate litigation against such individual and/or entity to ensure compliance with this policy statement of the Board of Airport Commissioners. [*Jews for Jesus, Inc. v. Board of Airport Commissioners*, 785 F.2d 791, 792 (9th Cir. 1986); emphasis added.] [1]

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[1] The reason this citation is to the Court of Appeals opinion is that the Airport Commissioners nowhere include the language of the Resolution in their Petition or Brief. Rather, petitioners provide

Not surprisingly, however, the Airport makes no attempt, despite the breadth of this language, to defend a right to entirely suspend the First Amendment at its terminal doors.[2] For "First Amendment activities" are not some

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only a "summary" of their policy (Brief for Petitioners ("Pet. Br.") at 3); that "summary", unlike the actual Resolution, suggests that the ban is not on *all* First Amendment activity, but only upon non-airport related speech or literature.

[2] The lack of fit between petitioners' officially promulgated policy and the one actually pursued in practice provides sufficient grounds for deciding this case in respondents' favor. In effect, petitioners are leaving the decision whether citizens otherwise legally present at the Airport are to be ousted because of their expressive activity to the discretion of the Airport management, unguided by any properly adopted regulation specifying which expressive activities by members of the public are to be permitted and which prohibited. "The situation is thus the same as if the [regulation] itself expressly provided that there could only be [First Amendment activities] in the unbridled discretion of the [Airport] officials." *Cox v. Louisiana*, 379 U.S. 536, 557 (1965). As *Cox* went on to note:

> The pervasive restraint on freedom of discussion by the practice of authorities [in such a situation] is not any less effective than a statute expressly permitting such selective enforcement. A long line of cases in this Court makes it clear that a State or municipality cannot "require all who wish to disseminate ideas to present them first to police authorities for their consideration or approval, with a discretion in the police to say some ideas may, while others may not, be . . . disseminated . . ." *Schneider v. New Jersey*, [308 U.S. 147, 152]. See *Lovell v. City of Griffin*, [303 U.S. 444]; *Hague v. CIO*, [307 U.S. 496]; *Largent v. State of Texas*, [318 U.S. 418]; *Saia v. New York*, [334 U.S. 558]; *Niemotko v. State of Maryland*, [340 U.S. 290]; *Kunz v. New York*, [340 U.S. 290]. . . . It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute. [379 U.S. at 557-58.]

[Continued]

species of endeavor distinct from the ordinary daily activities in which human beings routinely engage at the Airport as elsewhere. Rather, "First Amendment activities" include all manner of activities that occur daily at the nation's airports.

For example, two relatives who meet each other after a long separation exercise First Amendment rights when they engage in discussion, whether that discussion concerns neighborhood gossip or weighty political or religious issues. Similarly, two strangers who happen to sit next to each other in an airport waiting area and choose to pass their time discussing the latest fashions, the day's newspaper headlines, the upcoming election, or the Pope's latest pronouncements are engaged in "First Amendment activities." The same is true of a student who brings with her to the airport and reads in an airport lounge

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[2] [Continued]

See, reaffirming this doctrine and distinguishing it from First Amendment overbreadth, *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796-799 & ns.14 & 15 (1984).

There is another reason, aside from the specter of selective enforcement, for invalidating prohibitions on First Amendment activity where there is no clearly articulated policy to guide enforcement. Where that is the case, it is impossible for courts reviewing the prohibition upon communication to understand the state interests that, in the view of the pertinent officials, justify whatever restriction on expression is involved. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 80-84 (1981) (Stevens, J., concurring) (where "the character of the prohibition [a municipality] seeks to enforce" is "hard to ascertain . . . [because] the record indicates that what actually happens . . . bears little resemblence to what is described in the text of the . . . ordinance," judicial review is impeded because "we are left to speculate as to the [locality's] reason for proceeding against [any individual] and as to the justification for the distinction the [locality] has drawn between [forms of expression]."); *see also* Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 S. Ct. Rev. 113, 137; Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219, 1243 (1984).

any literary work, for example, a novel by Charles Dickens, Karl Marx's *Das Kapital*, or the Holy Bible; nor does the student cease engaging in a "First Amendment activity" by showing a favorite passage to the person sitting next to her, or by offering to give the book to that person as a gift. A traveller who drafts part of a novel, business memorandum, or scientific report while between planes is also engaging in "First Amendment activity," as is a reporter who comes to the airport to interview an arriving celebrity. And any individual who purchases the Los Angeles Times or the latest best-seller as he or she leaves LAX is engaged in "First Amendment activity" as well. As far as we can tell, none of these activities have been banned at the Airport, nor do the Airport Commissioners claim the authority to ban such activity.

Rather, petitioners devote their brief to the defense of a somewhat narrower proposition, based on what is termed a "summary" of the Airport's policy. That "summary"—which appears in petitioners' brief in quotations marks (Pet. Br. at 3), but which nowhere appears in the record of this case—indicates that the ban on respondents' speech and publication distributing activity is in pursuit of a policy limiting activities at the Airport to "airport-related uses." Pet. Br. at 3.

Petitioners' "summary" of the Airport's policy is simply inconsistent with the agreed-on factual stipulations upon which this case must be decided. For those stipulations make it clear that while the Airport does not affirmatively foster, by setting aside special space or facilities, activities not regarded as useful to the travelling public (*see, e.g.*, Jt. App. 11a),[3] no general attempt is

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[3] Even this proposition is somewhat problematic, given the record in this case. For example, while the Airport defends its leasing of space for a reading room to the Christian Science church as providing a quiet waiting space for the public (Pet. Br. 26), that explanation ignores the fact that "religious literature pertaining to the Christian Science faith" is on display in the room. Jt. App. 21a. Similarly, the attempt to justify a display on endangered

made either to restrict entry to the LAX terminals to those with airport-related purposes or to restrict those individuals present in the terminal to activity, expressive or otherwise, related to the Airport or to air travel. Jt. App. 8a, 13a; *see also* Pet. App. 14a (district court noting that "[t]he City . . . stipulated to other uses of LAX for non-travel related matters.") Conversely, while petitioners' "summary" of the Airport policy suggests that respondents would have been allowed to distribute their literature had the literature discussed the airport, or air travel, or, perhaps, if respondents distributed literature while waiting to board an airplane, there is nothing in the record to suggest that such activity would have been allowed, and the plain tenor of petitioners' overall argument is that such activity would not have been allowed.

Thus, it is simply not true that the Airport has pursued a neutral policy of limiting the use of a public facility by members of the public to a narrowly defined primary intended use. Rather, it appears that a more accurate statement of the Airport Commissioner's policy would be as follows:

The Airport reserves the right to ban pure, peaceful nonobstructive speech activity, including religious proselytizing and the sharing of written religious documents,[4] *whenever Airport management perceives that the speaker's primary purpose in being at the Airport is to engage in First Amendment expression and that the speech is not incidental to some other activity.* The question in this case therefore comes down to whether the Airport Commissioner may maintain such a policy.

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species as a warning that importation of certain goods is illegal (Pet. Br. 20), is belied by the fact that, as far as appears in the record, the display contained no such warning.

[4] There is no issue in this case regarding airport regulation of *fund solicitation*, since it is undisputed that such solicitation is against the policy of respondent Jews for Jesus, and that none occurred during the incident underlying this lawsuit. Jt. App. 18a.

I. Petitioners' main defense of the Airport's policy is a simplistic one: because the Airport does not have as its "principle purpose the free exchange of ideas," the Airport "is not a traditional public forum. . .," and has broad latitude to ban expressive activity. Pet. Br. at 8. As we demonstrate in Part I, *infra*, this Court's cases do not sanction any such far reaching authority to prohibit First Amendment activity. Airport terminals, as we show, share the functional and structural characteristics that have led this Court to conclude that while expressive activities can be regulated on streets and in parks so as to assure that the principal purposes of such locations—transportation in the case of streets, and recreation in the case of parks—are not unduly impeded, such activities cannot be banned entirely in those areas, even if some limited measure of interference with the area's ordinary use necessarily occurs. The same First Amendment rule applies in this case.

II. Petitioners also contend that certain of this Court's recent First Amendment cases stand for the proposition that if airport terminals are *not* analogous for First Amendment purposes to streets and parks, then the Airport's right as owner of the property to exclude communicative activity is subject to no meaningful First Amendment restriction other than a prohibition on direct viewpoint distinctions. As we demonstrate in Part II, *infra*, the tripartite public forum typology of cases such as *Perry Education Association v. Perry Local Educators Assn.*, 460 U.S. 37 (1983) and *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. ——, 53 U.S.L.W. 5116 (1985), upon which petitioners rely for treating the Airport like private property, is of little aid in establishing the appropriate First Amendment balance in a case of this kind.

Perry, *Cornelius* and like cases grew out of situations which shared the following characteristics: (1) the government was itself involved in communication-fostering

activity; (2) the governmental property in question was devoted to internal governmental operations, or some other use analogous to private commercial activity; and (3) the issue in the case involved the claim of a right to physical access to a particular facility, rather than the claim of a right to engage in expressive activity by individuals whose physical access to a physical location was unquestioned.

Where those factors predominate, there are compelling reasons for striking the First Amendment balance in favor of a fairly wide deference to governmental decisions about the appropriate use of the governmentally-assisted mode of communication. Where, on the other hand, the government's principal use of a physical location has nothing to do with expression, the location is "public" in the sense that direct use by the citizenry generally (or some subgroup thereof) is affirmatively encouraged, or in the sense that unrestricted physical access is permitted, absolute governmental restrictions upon expressive activity entail dangers to First Amendment values similar to those posed by direct censorship of expressive activity. Under those circumstances, the government's actions must at least meet the test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968): any restriction on expression must serve important governmental interests unrelated to the suppression of expression and the restriction must be no greater than is essential to further the governmental interest. *See Taxpayers for Vincent, supra*, 466 U.S. at 803-05. The Airport's policy in this case is clearly invalid under that standard.

I. THE PUBLIC AREAS OF THE LAX TERMINAL CONSTITUTE A QUINTESSENTIAL PUBLIC FORUM.

The Airport Commissioners have attempted to prohibit certain First Amendment protected expression in the public areas of LAX's terminal facilities. This prohibition

is impermissible under the First Amendment because the Airport terminal constitutes a "public forum," which, absent a compelling state interest, can be regulated only by means of narrowly tailored, content neutral, reasonable "time, place and manner" restrictions. *United States v. Grace*, 461 U.S. 171, 177 (1983). Because petitioners have failed to advance a compelling government interest (or, indeed, even a permissible interest) justifying the prohibition, and because the prohibition is neither narrowly tailored, content neutral, nor a reasonable regulation of time, place or manner, but is instead a total ban on certain otherwise protected expression, the prohibition violates the First Amendment guarantee of free expression. *See Id.* at 181, 183 (total ban on protected expression in public forum cannot be justified as a reasonable regulation of time, place or manner and, as such, is unconstitutional).

A. A Quintessential Public Forum Is Defined By The Use of the Location for Expressive Activities, Not By Its "Principal Purposes" or By The Government's "Dedication" of The Location to Expression.

A. In *Hague v. CIO*, 307 U.S. 496 (1939), Justice Roberts rejected the notion, *see, e.g., Davis v. Massachusetts*, 167 U.S. 43 (1897), that the government may regulate expression on certain types of public property to the same extent as may an owner of private property. Instead, the government holds at least some public property under a First Amendment "servitude":

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

[307 U.S. at 545 (opinion of Justice Roberts). *See* Kalven, *supra*, 1965 S.Ct. Rev. at 127.]

Since *Hague*, this concept of a First Amendment limitation on the government's power, acting in its proprietary capacity, to *entirely* close certain areas to expressive activity has been refined in developing the "public forum" doctrine. *See, e.g.*, Kalven, *supra*. Despite the differing formulations used to state the doctrine, *compare Grace, supra*, 461 U.S. at 178 *with Grayned v. City of Rockford*, 408 U.S. 102, 117-18 (1972), the Court has been unyielding in its protection of speech within the "quintessential" (sometimes referred to as the "traditional") public forum. *See, e.g., Grace*, 461 U.S. at 179-80, 183-84. As a result, the quintessential public forum doctrine serves as a *guarantee* that—in order to provide some minimal opportunity for citizens to discuss with each other face-to-face matters of mutual concern—communication among citizens is a use that must be accommodated in some public locations in some fashion, along with those locations other uses. That accommodation entails some limited measure of inconvenience or annoyance to those using the location for non-speech purposes while preserving the basic use of the area for its other intended purposes. *See, e.g., Cox v. New Hampshire*, 312 U.S. 569, 576 (1941). *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 315 (1968); *Perry Education Association, supra*, 460 U.S. at 45.

B. This Court has frequently referred to the above-quoted language from Justice Roberts' opinion in *Hague* in its public forum discussions. *See, e.g., Kunz v. New York*, 340 U.S. 290, 293 (1951); *Perry Education Association*, 460 U.S. at 45. Thus, in determining whether a particular piece of public property constitutes a quintessential public forum, it is useful to begin by re-examining *Hague*.

That re-examination demonstrates that, contrary to petitioners' submission, the public forum concept, even at its inception, in no way turned upon whether a particular location has the "principal *purpose* of the free exchange of ideas" or whether "[t]here is [intentional] *dedication* to communicative purposes." Pet. Br. at 8 (emphasis added). *Hague* does not imply that a quintessential public forum must be devoted primarily to expression, or that the governing entity must desire or intend the area to be one in which communication is encouraged or allowed.[5] Rather, *Hague* makes clear that the relevant factors are first, that the area is one generally open to broad *use* by members of the public and second, that this public use *often involves* expressive activity: "[T]hey [such areas] have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." 307 U.S. at 515.

Clearly, this is as it must be. The principal purpose of streets (and airports) is transportation (*Schneider v. New Jersey*, 308 U.S. 147, 160 (1939); *Valentine v. Christiansen*, 316 U.S. 52, 54-55 (1942)); that of parks is recreation (*Hague*, 307 U.S. at 505)). *See also, e.g., Schneider*, 308 U.S. at 160 ("Municipal authorities, as trustees for the public, have the duty to keep their communities streets open and available for movement of people and property, the primary purpose to which streets are dedicated"); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) ("Governmental authorities have the duty and responsibility to keep their streets open and available for movement"); *Niemotko v. Maryland*, 340 U.S. 268, 276 (1951) (Frankfuter, J., concurring) (the issue in cases concerning the dissemination of ideas in public

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[5] This factor, however, may be relevant to the determination whether the property constitutes a "designated" or "limited" public forum. *See Perry Education Association*, 460 U.S. at 45-46 & n.7.

places is "how to reconcile the interest in allowing free expression of ideas in public places with the protection of the public peace and of the primary uses of streets and parks"); *id.* at 279 ("control of speech in streets and parks draws on . . . considerations [of] protection of the . . . primary uses of travel and recreation for which streets and parks exist.") Thus, neither streets nor parks are maintained for the principal purpose of providing a place for expression.

Similarly, neither streets nor parks are "dedicated" by the government to expression. Rather, it is because governments have repeatedly *refused* to "dedicate" those areas to expression, and instead have asserted the right to ban expression freely, that this Court has been faced with a myriad of cases concerning prohibition of speech on public streets and parks. *See, e.g., Grace* (ordinance prohibiting picketing on public sidewalk in front of Supreme Court building); *Grayned* (ordinance forbidding demonstration on public sidewalk adjacent to public school grounds); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968) (prohibition of rally near courthouse steps); *Cox v. Louisiana* (prosecution for demonstration on public sidewalk in vicinity of courthouse); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (ordinance regulating door-to-door leafletting); *Jamison v. Texas*, 318 U.S. 413, 415 (1943) (ordinance based upon city's view "that it has the absolute power to prohibit the use of the streets for the communication of ideas); *Schneider* (same); *Hague* (ordinance denying right to hold public meetings in public streets and parks); *Davis v. Massachusetts* (ordinance forbidding public speaking in public park).[6]

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[6] This is not to say, of course, that the primary functions of parks and streets are irrelevant to the constitutional inquiry. Rather, from the nascency of the public forum doctrine it has been recognized that the primary purposes of streets and parks are such that the expressive uses to which these public forums may be put

In short, to ascribe the protection of expressive activity on streets and in parks to the intent or the purpose of the governing authorities is simply to rewrite history, and to ignore the fifty years of First Amendment litigation necessary to establish and secure that protection.

C. The question then becomes what *are* the attributes of a publically-owned location that make the quintessential public forum doctrine applicable. *Hague* has on occasion been read as suggesting a strictly historical approach to this question. And it is true, of course, that, unlike streets, airport terminals, a twentieth century creation, have not been used since "time out of mind," for expressive purposes.[7]

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are accommodated rather simply through reasonable time, place and manner regulation:

> The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied. [*Hague*, 307 U.S. at 515-16 (opinion of Justice Roberts).]

The point is that the non-expressive nature of the principal uses of the public property does not foreclose or determine the public forum inquiry; rather, these ordinary activities are taken into account in the consideration of what regulations of time, place and manner will be considered reasonable. *See also Schneider*, 308 U.S. at 160-61; *Grayned*, 408 U.S. at 115-17; *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647-48 & n.10 (1981).

[7] To the extent that the history of the use of government property for expressive purposes is relevant, this Court has indicated that recent use is significant. *See Taxpayers for Vincent*, 466 U.S. at 815, n.32 (referring to the public forum as government property "clearly held in trust, either by tradition *or recent convention*, for the use of citizens at large") (emphasis added). It is clear from the decisions concerning terminal facilities, *see infra* pp. 14-18, that there is a "recent convention" of the use of such facilities for expressive purposes. Moreover, the stipulated facts in the

But the language of "tradition" in *Hague* and its progeny cannot be read literalistically. Rather, the fact that streets and parks have on occasion been used for expressive purposes throughout their history is simply confirmation of the facts that first, those locations are peculiarly suitable for such activity, and second, that any interference worked by peaceful expression with the area's transportation and recreational purposes are such as can be reasonably accommodated without significantly sacrificing those purposes. For example, the rule in *Hague* would certainly be applicable to a particular street which had no "tradition" of use for expressive purposes. In effect, the tradition of expression on public streets in general would substitute for the lack of such a tradition with regard to a street which had never seen a parade, protest or picket. This is because streets are so similar, one to the other, in *structure and function* that the elements which make speech appropriate to, and compatible with, one are common to all.

It follows that, in determining whether *other* public facilities are quintessential public forums, the governing factor must be whether there are structural and functional identities between the location in question, on the one hand, and streets or parks, on the other.

B. Airport Terminal Facilities Are Quintessential Public Forums.

"[A]n unsual consensus of judicial, legislative and administrative opinion would classify the public areas of [airport terminals] squarely within the public forum family." *United States Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 766 (D.C. Cir. 1983) (hereinafter cited as "*Southwest Africa*"). *See also Fernandes v. Limmer*, 663 F.2d 619

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present case reveal an extensive recent history of use of the LAX terminal for a wide variety of expressive activities. *See* Jt. App. 11a-15a, 20a-21a.

(5th Cir. 1981) *cert. dismissed*, 458 U.S. 1124 (1982); *Rosen v. Port of Portland*, 641 F.2d 1243, 1245-46 (9th Cir. 1981); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir. 1975) (hereinafter cited as "*CAMP*"); *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968). *See also International Society for Krishna Consciousness, Inc. v. Eaves*, 601 F.2d 809 (5th Cir. 1979); *Kuszynski v. City of Oakland*, 479 F.2d 1130, 1131 (9th Cir. 1973). These decisions are the result of detailed structural/functional analyses comparing airports and airport-like facilities to public streets.

First, like a street, an airport's principle purpose is to facilitate travel from one place to another. Further, an airport terminal is functionally similar to a street in that it contains "many of the facilities and services of a fair-sized municipality" (*Southwest Africa*, 708 F.2d at 764), including facilities "where air travelers as well as the general public may shop, dine, imbibe, and sightsee" (*Fernandes*, 663 F.2d at 627). In the present case, the Airport terminal contains cocktail lounges, restaurants, newsstands, gift shops, barber shops, informational displays, art displays and banking facilities. Jt. App. 7a-8a. Indeed, in both the terminal facility at LAX and in the terminal facilities under consideration in the above cited cases, the general public is not invited into the terminal merely for travel-related purposes, but also to utilize the aforementioned facilities. *See* Jt. App. 13a; *CAMP*, 508 F.2d at 925. *See also Fernandes*, 663 F.2d at 627 ("The analogy between these terminal concourses and public streets is further strengthened by the lack of restrictions on public access to the commercial establishments located along the . . . passageways . . . .").

Second, airport terminals and streets are structurally similar. As the Second Circuit noted, with respect to the Port Authority Bus Terminal, in words equally relevant here:

> [Passengers] are in the Terminal for the principal purpose of moving to and from other means of purpose of moving to and from other means of transportation—and the space is designed for precisely the purpose of transit. With the scope of operations so vast, the enclosure is desirable and indeed necessary if the congestion and confusion that would attend if all waited for buses on the street are to be avoided. In other times or better climes travelers have waited by the roadside or under some shelter for the oncoming vehicle. But here, the buses drive into the building and the passengers meet them there. The terminal, with its many adjuncts, becomes something of a small city—but built indoors, with its "streets" in effect set atop one another, and vehicles operating under, above, and to the side, not unlike some futuristic design for urban living. [*Wolin*, 392 F.2d at 89.]

Certainly the mere presence of a roof cannot make a decisive difference in First Amendment jurisprudence. Covered public streets have existed in many cities for hundreds of years, and exist now in this country in cities such as Minneapolis and Spokane, where weather conditions render such devices necessary. Meteorology has not heretofor been thought to be the science that defines the scope of the First Amendment.[8]

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[8] The Federal Aviation Administration (FAA) has also noted the structural and functional similarities between airport terminals and streets, and has drawn a legal conclusion with respect to First Amendment rights similar to that drawn by Courts of Appeals. In the context of an administrative proceeding, mandated by 49 U.S.C. § 1359 (West Supp. 1986), to promulgate regulations governing expressive activity at Washington National and Dulles airports, the FAA observed,

> There is a considerable amount of social and commercial interchange in the terminals and, in many respects, the terminals are like any other public thoroughfare where there is no question that the Constitutional guarantees of freedom of speech, the exercise of religion and the right to peaceable assembly apply. These activities enjoy the protection of the First Amendment, and they may not be regulated by airport au-

Third, an airport terminal shares the characteristics that make expressive activity appropriate to, and compatible with, the other activities that take place on a street. Unlike an office building or a courthouse, for example, a terminal's normal uses are not those that require privacy or solitude; its inhabitants are not engaged in pacific or reflective activities. *Wolin*, 392 F.2d at 89; *see also CAMP*, 508 F.2d at 925. Rather, like a street or a covered marketplace, a terminal "is attended with noisy crowds and vehicles, some unrest and less than perfect order." *Wolin*, 392 F.2d at 90. Indeed, all manner of expressive activities routinely take place in terminals, as on streets, as an inherent part of their operation. *See supra*, pp. 2-5, 15-16. Thus, there is no realistic need to suppress expressive activities on a street or in an airport terminal in order to assure the smooth, uninterrupted operation of the facility.[9]

Finally, an airport terminal is often particularly well adapted to the intended communication. In *Wolin*, the plaintiff was attempting to communicate an antiwar message to the general public, and to soldiers particularly, who passed through the terminal in great numbers. 392 F.2d at 90-91. In the context of the present case, it should be noted that airport facilities are especially well suited to expressive activity by speakers without the resources to gain access to the most important and influential means of communication, the mass media. This is be-

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thorities in the same manner as commercial activity. [Solicitation and Leafletting Procedures at National and Dulles International Airports, 45 Fed. Reg. 35,314 (1980).]

The regulation, as enacted, allows access for expressive activities. *See* 14 C.F.R. §§ 159.91-.94 (1982).

[9] Even if this were not the case, it would make no difference in the context of the present action. Here, the stipulated facts reveal that the conduct of the respondents presented no interference with the operation of the terminal. *See* Jt. App. 18a, 19a. *See also CAMP*, 508 F.2d at 925 (no contention that "the activities of the plaintiffs do in fact obstruct airport traffic").

cause airports allow such speakers to spread their message inexpensively to a unique audience not found on city streets: travelers, who in turn, take that message to all corners of the nation (and, indeed, the world). Moreover, because many users of airline terminals are waiting for planes rather than rushing along, they are more likely to be willing to listen to the views of fellow citizens than pedestrians on city streets. Thus, the small-scale speaker can achieve a much greater dispersion of, and attention to, his message at an airport than would otherwise be possible.[10]

Taking into account the above factors, "it seems clear that the public places in these airports are far more akin to such public forums as streets and common areas than they are to such nonforums as prisons, buses, and military bases." *Southwest Africa*, 708 F.2d at 764. It follows, we submit, that the Airport terminal in the present case constitutes a quintessential public forum and, thus, that the petitioners' total ban on protected expression is unconstitutional.[11]

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[10] These unique characteristics are particularly applicable to LAX, which is the "largest destinational airport in the world with the largest number of enplaning and deplaning passengers." Jt. App. 9a. Moreover, the sidewalks outside the LAX terminals do not provide adequate access to this unique audience; "at least 25 percent of the passengers [at LAX] do not use the sidewalk area." Jt. App. 9a.

[11] *Heffron, supra*, is not to the contrary. The question there was not whether the forum in question (a state fairground) was a public forum, but whether the challenged restriction—which, unlike the regulation in this case, applied neutrally to both expressive and nonexpressive activity—constituted a reasonable time, place and manner regulation of the forum. *See Heffron*, 452 U.S. at 647-48 (citing *Grayned, inter alia*). For the Court in *Heffron* stressed that the fairground was *not* entirely closed to proselityzing activity; the regulation in question left free reign for person-to-person oral communication. Thus, the type of restriction challenged in *Heffron*, a regulation of the places at which certain expressive activity could take place within the grounds, was much narrower than the total

II. EVEN IF THE LAX TERMINAL IS NOT A QUINTESSENTIAL PUBLIC FORUM, THE TOTAL BAN UPON CERTAIN PEACEFUL, NONOBSTRUCTIVE COMMUNICATIVE ACTIVITY IS INVALID BECAUSE SUCH A BAN DOES NOT SERVE IMPORTANT GOVERNMENTAL INTERESTS UNRELATED TO THE SUPPRESSION OF EXPRESSION IN A MANNER THAT WORKS NO GREATER RESTRICTION ON EXPRESSION THAN IS ESSENTIAL TO FURTHER THE GOVERNMENTAL INTEREST.

Petitioners maintain that if the Airport is not a quintessential public forum, then expressive activity of any kind can, consistent with the First Amendment, be banned at the Airport subject only to the limitations that the prohibition be reasonable and not be an attempt to sup-

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prohibition of "First Amendment activity" anywhere within the public forum here at issue. If, similar to the authorities in *Heffron*, petitioners were attempting to restrict expressive activity to "booths" within the airport terminal, an entirely different case would be presented.

Heffron does, to be sure, indicate that in gauging the validity of truly neutral time, place and manner restrictions, the precise nature of the location is relevant. The reason is that such restrictions are primarily designed to assure that communicative activity does not seriously disturb an area's ordinary uses. In making that determination, the precise nature of a given area is obviously relevant. *See* 452 U.S. at 650-51.

Thus, for example, we would expect that in airports, the manner of expressive activity could be regulated considerably more extensively than on streets. In particular, activities such as parades, large demonstrations or mass meetings might never be appropriate at airports, even though, as *Hague*, and *Cox v. New Hampshire*, indicate, municipalities must provide some access to streets and parks for such purposes. The reason is that, unlike streets, airports usually provide only one way to reach any given destination, so that temporary obstructions cannot be avoided by taking another route; in addition, because airplanes run on schedules, even minimal delays in reaching one's airport destination may lead to much more serious delays in overall travel than such a delay on the streets.

press a particular viewpoint.[12] In support of that proposition, petitioners rely on several recent cases, including *Perry Education Association*, *supra*, and *Cornelius*, *supra*, which, they claim, establish that except in the few locations that constitute quintessential public forums, the government is free to prohibit communicative activity without regard to the constitutional standards that ordinarily protect expressive activity.

Our understanding of the nonpublic forum cases such as *Perry* and *Cornelius* is quite different. Those cases simply outline "a means of determining when the Government's interest in limiting the use of its property to its intended purposes outweighs the interest of those wishing to use the property for other purposes."

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[12] It is doubtful that petitioners' policy meets even their posited extremely deferential standard. The *only* justification petitioners offer for their policy of selectively prohibiting communicative activity is that an airport is entitled to restrict the use of its facilities to airport-related purposes. This justification is belied by the express stipulation that petitioners have not otherwise attempted to limit use of the Airport by the public to those individuals with an airport-related reason to enter. Rather, as we noted at the outset (*supra*, pp. 5-6), petitioners' policy is to permit individuals with non-airport related purposes to enter the premise for any compatible use *except where* the individual's primary purpose is to engage in communicative activity. For that rather odd policy petitioners have offered no rational explanation whatever.

The Airport's bare assertion that its "functions would be seriously disrupted by the activities of all the groups who wish to use the terminal facilities to expound their views on a myriad of subjects" (Pet. Br. at 26-27) certainly does not provide the requisite justification. This assertion, in the first place, lacks any support in the record. In addition, the claim is contradicted by the fact many of the nation's airports, including those in the District of Columbia, operate, apparently without "serious[] disrupt[ion]", and without petitioners' total prohibition policy. *See supra*, pp. 14-18, and cases and regulations cited therein. Most importantly, petitioners offer no explanation as to why use of the airport by those by those "who wish to use the terminal facilities to expound their views on a myriad of subjects" would "seriously disrupt" the Airport's functions (Pet. Br. at 26-26) while the presence of other individuals pursuing other non-airport related purposes would not.

Cornelius, 53 U.S.L.W. at 5119. In effect, the nonpublic forum doctrine provides a formula for stating in a shorthand fashion, the result of balancing First Amendment interests against nonspeech governmental interests in a certain class of situations.

At the same time, in other recent cases—most importantly, *Taxpayers for Vincent*, *supra*—the accommodation between First Amendment interests and the governmental interest in control of public property has been articulated through generally applicable First Amendment standards, treating the governmental interest in control of the citizens' property as an interest no different from any other neutral governmental interest asserted to countervail the interest in free speech. Thus, *Taxpayers for Vincent* applied the standard derived from *United States v. O'Brien*, 391 U.S. 367 (1968); *viz.*, whether the regulation in question furthers an important or substantial governmental interest, unrelated to the suppression of free expression, and does so in a manner that works no greater restriction on speech than is essential to further that interest. *See* 466 U.S. at 803-05.[13]

The threshold question, then, is whether this is the type of case in which the shorthand statement of the law summarized in the nonpublic forum doctrine governs or whether, instead, the circumstances here are sufficiently dissimilar from those in which the nonpublic forum standards were developed to require, in the manner of *Taxpayers for Vincent*, a more detailed consideration of the precise nature of the competing interests at stake. In deciding that question, it is useful to bear several points in mind.

First, the oft-repeated edict that the government " 'no less than a private owner of property has power to

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[13] The Court in *Taxpayers for Vincent* was unanimous in holding that this was the applicable standard, although three members of the Court disagreed with the application of the standard to the particular circumstances. *See* 466 U.S. at 824.

preserve the property under its control for the use for which it is lawfully dedicated' " (*Cornelius*, 53 U.S.L.W. at 5119), does not signal that bare control of private property, as such, is a governmental interest entitled to protection. In contrast to private property ownership, public ownership has no constitutional dimension. *Cf.*, *Hague*, rejecting the rule of *Davis v. Massachusetts*. Rather, the government owns property and controls it in pursuit of various discrete governmental purposes, ultimately on behalf of the citizenry at large. Since those purposes vary widely, the nature and strength of the governmental interest in control of its property has no unitary quality, but, instead, varies widely.

Second, it is nonetheless true that "[*a*]*t some point*, the government's relationship to things under its dominion and control is virtually identical to a private owner's property interest in the same kinds of things." *Taxpayers for Vincent*, 466 U.S. at 814, n.31 (emphasis supplied). That point is approached, for example, where the particular property use does not involve providing direct governmental service to the public at large but, instead, involves internal governmental operations. Thus, to cite the example given by *Taxpayers for Vincent*, city-owned automobiles may be essential to permit the government to function, but, unlike buses, streets or airport terminals, the public at large has no right to make direct use of those automobiles for any purpose, expressive or otherwise. As to such property, there is a strong interest in assuring that the government realizes the efficiencies of unrestricted control, parallel to that permitted private enterprises engaged in parallel operational and administrative tasks.

Third, as the foregoing suggests, there is a major difference, albeit not necessarily a controlling one, between locations as to which physical access is permitted as a matter of course to the general public, including its members who are claiming the right to engage in expressive activity, and areas or modes of communication

as to which physical access is itself the claimed First Amendment right. In the first of these contexts even a private party's property interests are deemed to be so worn down by usage that it is constitutional to require the owner to permit communicative activity by individuals otherwise validly present. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). *Compare Republic Aviation v. Labor Board*, 324 U.S. 793 (1945) *with NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956); *and Hudgens v. NLRB*, 424 U.S. 507, 521 n.10 (1976) (the distinction between an employer's interest in restricting physical access to its property by strangers to the enterprise and the interest in limiting the communicative activity of those otherwise validly present is "one of substance"). Where physical access is open there is, of course, no governmental interest in controlling the number of individuals on the premises. And a government permission to use government facilities only on the condition that the members of the public refrain from certain peaceful, nonobstructive communicative activities smacks of the censorship at which the First Amendment is most assuredly aimed.

Finally, there are differences of substance between situations in which the government acts to affirmatively facilitate communication or expression between certain designated classes of speakers and listeners, and those in which the location to which the regulation applies is exactly that—a physical area—and not a "forum" at all in the sense of a means of exchanging ideas. In the former, the government is acting to forward First Amendment interests, by providing citizens, albeit only a subgroup thereof, with a means of reaching each other not otherwise available. An individual seeking access to such a government-controlled specialized speech forum is in reality requesting that the government provide him with assistance in reaching an audience. Moreover, in that situation, the government necessarily has some legitimate interest in such aspects of the communicative activity as

its content and the identity of speakers, for those factors define the basic parameters of the role the government has voluntarily undertaken. In contrast, where the government is not directly assisting speech but is simply in charge of a physical location conducive to speech, an individual who is otherwise allowed on the premises is, in asserting First Amendment rights, asking only that the government *not interfere with his speech*, and not that the government assist his speech. This distinction is of particular weight where the government's communication-enhancing activity requires extensive direct contact between the individual seeking access and government officials.

The Court has applied the nonpublic forum approach where the considerations just canvassed indicate that the "government property interests essentially mirror[] analogous private interests." *Taxpayers For Vincent*, 466 U.S. at 815, n.32. In each instance, physical access to a specialized governmental mode of communication was being sought. *See Perry Education Association, supra*; *Cornelius, supra*; *United States Postal Service v. Greenburgh Civic Association*, 453 U.S. 114 (1981); *Lehman v. City Shaker Heights*, 418 U.S. 298 (1974).[14] In each instance the governmental mode of communication required that some distinctions be drawn among speakers, and, in most, required direct contact between the speakers and government officials. The question was therefore

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[14] We do not understand *Greer v. Spock*, 424 U.S. 828 (1976) to come within the nonpublic forum class of cases. Rather, as this Court made clear in its treatment of *Greer* in *Brown v. Glines*, 444 U.S. 348, 354 (1980), the First Amendment analysis in *Greer* did not turn on the nature of the property in question but on a more general First Amendment balancing approach similar to that used in *Taxpayers for Vincent*. *See Brown v. Glines*, 444 U.S. at 355 (the regulations in *Greer* "protect a substantial government interest unrelated to the suppression of free expression"—*viz.*, protection of military discipline—and "restrict speech no more than is reasonably necessary to protect the substantial governmental interest.")

not whether the government should simply leave individuals otherwise validly present alone to engage in expressive activity, but whether the government was required to provide assistance to a broader range of speakers than the government had chosen to aid. Finally, the government's activities in each of these instances was in some sense managerial or enterpreneurial, activities with precise parallels in the private sector: *Perry* and *Cornelius* involved internal communications with government employees, while *Greenburgh Civic Association* and *Lehman* involved governmental "sales" of valuable opportunities to communicate.

In contrast, even if contrary to our contention in Part I, *supra*, the government property interest in an airport terminal is not deemed to fall within the "paradigm[] of [a] government property interest . . . clearly held in trust either by tradition or recent convention for the use of the citizens at large" (*Citizens For Vincent*, 466 U.S. at 815, n.32), it is still clear that the situation here is closer to that situation than to the one in which "government property interests essentially mirror[] private interests" (*id.*). The Airport terminal is freely accessible to all members of the general public; the Airport is not engaging in any communication enhancing activity; and the Airport is not conducting its internal business operations, common to any modern enterprise, at the location in question. Rather, the Airport is providing to the public at large a physical location with no private sector analog; the respondents are not seeking any affirmative aid from the Airport; and there is no situational imperative for making choices between communicators or communications. Thus, respondents claim is merely that they carry with them at the Airport as elsewhere the right to engage in communicative activity that does not interfere with any substantial, speech-neutral governmental interest that cannot be accommodated through sensible time, place and manner regulation.

Because this is therefore a case which, looked at most favorably to the Airport Commissioners, falls between the "paradigms of government property interests essentially mirroring analogous private interests and those clearly held in trust . . . for the use of the citizens at large" (*Taxpayers For Vincent*, 466 U.S. at 815, n.32), it is the kind of case in which nonpublic forum analysis does not provide "a workable analytical tool", and in which the more detailed and painstaking approach to the First Amendment balancing problem employed in *Taxpayers For Vincent* itself is appropriate.[15] Under that approach, it is clear that the Airport's policy cannot stand.

The Airport Commissioners have failed to assert any substantial governmental interest separate from a bare desire to control the use of the terminal property. And, in any event, there would clearly be ways other than a total ban to control, through valid time, place, and manner restrictions, any likely adverse impact due to communicative activity at the Airport, including any impact due to the number of people seeking to engage in such activity. See *supra*, pp. 2-5, 14-18 & 20, n.12. Because the Airport Commissioners therefore have no viewpoint-neutral reason sufficiently strong to override respondents' interest in free expression, the Airport's policy of prohibiting certain kinds of peaceful, nonobstructive expression in the Airport terminal must fail.

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[15] *Taxpayers for Vincent* did discuss briefly the pertinence of public forum analysis to that case. 466 U.S. at 814. However, it is clear that the Court viewed the public forum approach as raising a separate issue of whether the nature of the property provided the speakers with *greater* rights than would be available under more general First Amendment doctrine, and not as a substitute for the careful, individualized balancing required by *O'Brien*. *See* 466 U.S. at 814 (characterizing the public forum question as whether, given the nature of the property in question, the speakers "occupy a *special position* in terms of First Amendment protection.")

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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